

United States
Circuit Court of Appeals

For the Ninth Circuit.

PASCO BAKOTICH,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court
of the District of Oregon.

MR. CHARLES W. ROBISON, Astoria, Oregon,
and MR. E. M. MORTON, Yeon Building,
Portland, Oregon,

For the Plaintiff in Error.

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BRIEF FOR PLAINTIFF IN ERROR.

On the 21st day of November, 1923, there was sworn to before J. H. Marsh, Clerk of the United States District Court for the District of Oregon, an information charging Pasco Bakotich with the violation of Sections Three and Twenty-one of Title Two of the National Prohibition Act.

This information contained three counts; the count of possession, the count of sale, and the count of nuisance.

Thereafter, on the 12th day of January, 1924, the defendant herein was arraigned and entered a plea of not guilty. Thereafter a trial was held and on the 20th day of February, 1924, a verdict was returned, which verdict was to the effect that the jury found the defendant guilty of all three counts of the information.

All orders and matters pertaining to the appeal are set forth in the Transcript of Record, pages 1 to 55, inclusive.

There is but one question involved in this case, and that is the question whether or not the defendant in this case was entitled to receive the instructions on *entrapment* as found on pages 33 and 34 of the Transcript of Record. The defendant predicates error upon the refusal to give defendant's instructions I and II, which are as follows:

I.

The Court instructs the jury that in cases where the criminal intent originates in the mind of the defendant, the fact that officers, either of the Government or of the State, used decoys or untruthful statements to furnish opportunity for or to aid the accused in the commission of a crime in order successfully to prosecute him therefor, that these acts of the officers are no defense, but, on the other hand, if the accused never conceived any intention of committing the offense, the fact that the officers of the Government or of the city incited and by persuasion and representation induced him to commit the offense charged, in order to entrap, arrest and prosecute him therefor, I instruct you that this is fatal to the prosecution, and the accused is entitled to a verdict of not guilty in relation to the alleged sale of the said intoxicating liquor to the witness McGhee.

II.

The Court instructs the jury where the criminal intent originates in the mind of the entrapping person, and the accused is lured into the commission of the offense charged, in order to prosecute him therefor, it is the general rule that no conviction may be

had, though the criminality of the act is not affected by any question of consent, therefore, if you find from the evidence in this case that the officer McGhee or any other officer of the State of Oregon, or of the city of Astoria, lured or induced the defendant, Pasco Bakotich, to commit the offense charged in order to prosecute him therefor, then I instruct you that your verdicts should be not guilty.

Together with this, and a corollary of the same proposition, the defendant predicates error upon the Court instructing the jury as was instructed on pages 37 and 38 of the Transcript of Record as follows:

“Something has been said here about a decoy, or about the act of McGhee acting as a decoy, in order to induce this defendant to commit the offense with which he is charged here. A person, and an officer, has a perfect right, for the purpose of determining whether crimes have been committed, to, as in this case, approach the person who is suspected, and propose to purchase liquor of him. That is done every day. It is done with reference to the postoffice departments. An officer who is carrying the mails, for instance, is suspected of taking money in it, and at the end of the route it is found that the letter has been opened and the money taken out. The fact of putting the decoy letter in the mail is for the purpose of obtaining information as to whether the person suspected is transgressing the law. So, in this case, McGhee had a perfect right to go

to this defendant and propose to buy liquor of him for the purpose of determining and ascertaining whether or not the defendant was engaged in the business of selling liquor; and that is about all there is to that.”

(Transcript of Record, pages 37 and 38.)

ERRORS RELIED UPON.

The Court erred in refusing the instructions of defendant, Pasco Bakotich, as found on pages 33 and 34 of the Transcript of Record (No. 4354), to wit, the Court erred in refusing to give defendant's instruction.

I.

The Court instructs the jury that in cases where the criminal intent originates in the mind of the defendant, the fact that officers, either of the Government or of the State, used decoys or untruthful statements to furnish opportunity for or to aid the accused in the commission of a crime in order successfully to prosecute him therefor, that these acts of the officers are no defense, but, on the other hand, if the accused never conceived any intention of committing the offense, the fact that the officers of the Government or of the city incited and by persuasion and representation induced him to commit the offense charged, in order to entrap, arrest and prosecute him therefor, I instruct you that this is fatal to the prosecution and the accused is entitled to a verdict of not guilty in relation to the alleged sale of the said intoxicating liquor to the witness McGhee.

U. S. vs. Healey, 202 Fed. 349.

Voves vs. U. S., 161 C. C. A. 827; 249 Fed. 191.

Peterson vs. U. S., 166 C. C. A. 509; 255 Fed. 433.

Smith vs. State, 61 Tex. Crim. Rep. 328; 135 S. W. 154.

Scott vs. State, 70 Tex. Crim. Rep. 57; 153 S. W. 871.

The Court erred in refusing to give defendant's requested instruction II, which is as follows:

II.

The Court instructs the jury where the criminal intent originates in the mind of the entrapping person; and the accused is lured into the commission of the offense charged, in order to prosecute him therefor, it is the general rule that no conviction may be had though the criminality of the act is not affected by any question of consent, therefore, if you find from the evidence in this case that the officer McGhee or any officer of the State of Oregon, or of the City of Astoria, lured or induced the defendant, Pasco Bakotich, to commit the offense charged in order to prosecute him therefor, then I instruct you that your verdict should be not guilty.

U. S. vs. Echols, 253 Fed. 862.

People vs. Barkdoll, (Cal.) 171 Pac. 440.

State vs. Feldman, (Mo.) 129 S. W. 998.

U. S. vs. Butts, 273 Fed. 35.

Samyck vs. U. S., 240 Fed. 60.

The Court erred in instructing the jury in relation to decoy letters on the ground and for the reason that there is no analogy between a decoy letter as illustrated by the Court, and the method used as disclosed by the record. (Transcript of Record, pages 37 and 38.)

Scott vs. State, 172 U. S. 343; 42 Lord's Edition, 341.

U. S. vs. Rapp, 30 Fed. 818; In re Wight, 134 U. S. 136.

U. S. vs. Mathews, 1 L. R. A. 104; 35 Fed. 890.

State vs. Hull, 33 Ore. 63.

36 A. S. R. 295, Connor vs. People.

81 Am. Dec. 364 and note, Thompson vs. State, French vs. State.

ARGUMENT.

Your Honors, if it please the Court, this is the case of the United States vs. Pasco Bakotich, who is charged with violation of Section Three and Twenty-one of Title Two of the National Prohibition Act. At the time of writing this brief it does not appear to me that I will be able in person to address your Honorable Body, by virtue of the fact that I do not think my client can raise sufficient funds to send counsel before this court. And if all that your Honors receive of this case is the cold print that lacks the touch and fire of the living word, may I respectfully request that you read this argument to its conclusion before reaching your decision.

The defendant is appealing from the judgment of the District Court of Oregon, and from a sentence imposed upon him, and bases his right and ground of appeal on errors alleged to have been made by the Court in instructing the jury, likewise error predicated upon the Court's refusal to give certain instructions.

Counsel for defendant feels that since in the trial of all cases, the medium by which these instructions are given to juries are words, then irrespective of the disparagement of the knowledge by the Court giving the instructions and the knowledge of counsel requesting them, that counsel may with good grace direct Your Honors' attention in relation, first, to the instructions requested; second, to the instructions given.

Pasco Bakotich lives in Astoria. He has lived here for twenty-six years. A fisherman as long as his physical condition would permit, he quitted this occupation on account of consumption, a disease prevalent in those who make their livelihood by following fishing in this vicinity. (Transcript of Record, page 26.)

The record further discloses that during the month of September, 1923, there was appointed as a police officer in the City of Astoria one Earl McGhee. McGhee had lived in Astoria since 1915. The first time he had seen Bakotich was on the 12th of September—*two days* prior to the alleged purchase of a drink of whiskey. (Transcript of Record, page 43.) His conversations with Bakotich, which are not denied in the record nor can they be denied, is

illustrative of a fact of which, I believe, Your Honors take judicial knowledge, that is, those things carried in the daily press and those things which are official actions in the small communities within Your Honors' judicial direction. If this is true, Your Honors are aware that neither Earl McGhee, the Chief of Police who appointed him, nor the Captain of Police who was present at the time of the arrest, are to-day officers of any kind—either municipal, state or Government. The winds that blew them into office blew them out again, and they are not Federal officers appointed either for their ability or their knowledge of those things which they seek to investigate. May I call to Your Honors' attention that no officer in this case who testified was a Federal officer; that this is a glorified city police case tried in a Federal court and not in a municipal court where it belongs. Bakotich's story is as follows:

“Q. You heard McGhee testify. Just tell the jury—talk to them so they can hear you—how you saw McGhee, how long you have known McGhee, all about that incident.

A. Well, McGhee, beginning when he come in the place?

Q. Yes.

A. There was another friend of mine, kind of old man, working in logging camp, I was playing a game of pitch with him for cigar, and beat him two games. And McGhee come in alongside this man, and asked me for a drink. I say, 'What kind of drink do you want?

What do you mean, drink?' I say, 'What do do you mean, drink? Soda water, water or what do you want?' He looks kind of sick to me, pale in the face. 'Why,' he says, 'Come on, Paul, give me a drink.' I asked him, I says, 'McGhee, this is two or three times this week you have come in this place. I don't know what you mean. Now, you better look out, don't come back, because you know very well we don't sell that stuff in this place. I never yet did sell one man, and I don't handle that stuff.' He says, 'Paul, please give me drink, because I am sick'; and you know so many times he is sick, and sick, and put his hand like this [illustrating]. 'Paul, please give me drink.' I say, 'McGhee, I ain't got any. Get off me.' I thought maybe he was drunk. I thought maybe I would give him fifty cents to go ahead, look for drink. 'Well, you don't know what happened to me last night.'

Q. Who said that?

A. McGhee. He says, 'You don't know what happened to me last night.' I says, 'I don't know—fight?' 'No,' he says, 'I went down on Astor Street, on some joint, and,' he said, 'I had about three hundred some odd dollars, just come from the camp. I am clean broke.' So, to tell you the truth, I had a bottle a little bigger than this one, in my possession.

Q. What bottle is that?

A. This is pills from Dr. Matson.

Q. How big was the bottle you had?

A. Just a little bigger than this bottle. And I had this for myself, you know, some time when I feel bad. I can't help it, you see, I am sick sometimes. Doctor tells me no smoke. I tell him I don't smoke—I smoke right now. Dr. Matson tell me don't smoke for three years, and Dr. Matson sent order for doctor, so he give me order for the same pills, and no smoke, no drink whiskey. A friend of mine tell me, 'What are you looking for doctor? Whiskey is good for your sickness. Your lung is bad.' He says, 'it won't small *hurst*.' I am no drinker, that I was ever drunk in my life, or drink so much; but I just have used little bit, and have in my pocket when I feel so bad, I go in somewhere in back room to have a little bit. Lasts me about three drinks, to take that way. Little bigger bottle than this—about three drinks.

Q. What did you do?

A. Then I took out from my pocket, I seen him so sick, I thought to save his life. I know what sickness is. And I poured it out in glass. I said, 'Go ahead, McGhee.' Then he come out, went in his pocket. He says, 'Paul, I want you this, because, I know of course, your money.' I say, 'No. That don't cost me money at all. I didn't buy that. There is friend of mine gave it to me. I gave you that for sickness, not for selling it to you. So if you want help go ahead. Take your money back, I don't want your money.' And I didn't take his money.

So then he see that something is wrong, that I don't take it away from him. Then he don't want the drink. So he took it he went back from the door, just as he was himself about three or four feet, he took his gun out, he says, 'Stay where you are.' I put my hand like this—I say, 'I won't move.' I stood right up. Chief of Police, about three minutes after, come in. He says, 'What have you got in your hand?' He says, 'There is whiskey; *Paul gave it to me.*' 'Is Paul under arrest?' 'Yes, sir.' He asked me, 'Paul, give me empty bottle.' So I went down, I give him bottle—he poured that from the glass in the bottle. He just took me in his own machine up to the station."

Your Honors will see at the outset, I hope, my idea and theory of entrapment. I TAKE IT TO BE THE LAW that to define the word to entrap, one may say that entrapment may be defined to be to ensnare, to catch by artifice, to involve in difficulties or distress, and the word "entrapment" may be declared to be synonymous with the words ensnare, inveigle, entangle or decoy.

I TAKE IT TO BE THE RULE OF LAW that where the criminal intent originates in the mind of the defendant that the fact that either the officers of the Government or the state used decoys or untruthful statements to furnish an opportunity for or to aid the accused in the commission of a crime, then the acts on the part of the officers would be no defense, but, on the other hand, if the accused never conceived any intention of committing the

offense, the fact that the officers of the Government or of the city incited and by persuasion and representation induced him to commit the offense charged, in order to entrap, arrest and prosecute him therefor, that their actions in that respect would be fatal to the prosecution and the accused would be entitled to a verdict of not guilty.

If the defendant is right as to the rule of the law, may I, with Your Honors' permission, follow the line of testimony undisputed in this record in order that Your Honors' may see my theory in this case.

This man came into Bakotich's place claiming to be sick.

“He looks kind of sick to me, pale in the face. ‘Why,’ he says, ‘Come on, Paul, give me a drink.’ I asked him, I says, ‘McGhee, this is two or three times this week you have come in to this place. I don’t know what you mean. Now you better look out, don’t come back, because you know very well we don’t sell that stuff in this place. I never yet did sell one man, and I don’t handle that stuff.’ He says, ‘Paul, please give me drink, because I am sick’; and you know so many times he is sick, and sick, and put his hand like this [illustrating]. ‘Paul, please give me drink.’ I say, ‘McGhee, I aint got any. Get off me.’ I thought maybe he was drunk. I thought maybe I would give him fifty cents to go ahead, look for drink. ‘Well, you don’t know what happened to me

last night.' (Transcript of Record, pages 27 and 28.)

I'll call Your Honors' attention to the halting, broken English of the defendant. Nevertheless, through it appears his idea.

McGhee had come into his place two or three times prior to the date of the defendant's arrest. No man has denied the statement of Bakotich on the witness-stand:

"I never yet did sell one man, and I don't handle that stuff." (Transcript of Record, page 27.)

Then McGhee begins, and may I be permitted, since this is an argument of entrapment and since I believe I am at least in accord with Webster's Unabridged Dictionary, to synonymize the word "entrap" with the word "ensnare," let me call Your Honors' attention to that more historic use of the word "ensnare" as Your Honors will find in the Book of Job in the thirty-fourth Chapter and the twenty-ninth and thirtieth verses:

"Him who giveth quietness who then can make trouble? and him who hideth his face who then can behold him? whether it be done against a nation, or against a man only: That the hypocrite reign not, lest the people be *ensnared*."

Let me direct Your Honors' minds back again to that scene in this man's place of business when McGhee tells him how sick he is and what happened last night:

“I says, ‘I don’t know—fight?’ ‘No,’ he says, ‘I went down on Astor Street, on some joint, and,’ he said, ‘I had about three hundred some odd dollars just come from the camp. I am clean broke.’ (Transcript of Record, page 28.)

Seated in the position that Your Honors are, with knowledge as meager as Your Honors have of local conditions in small towns throughout the territory over which Your Honors must exercise your judicial control, the word “Astor Street” may mean little or it may mean much. To the sea-faring man, to the man who lives in Calloa, to the man who lives in San Francisco whose occupation is handling of sea-faring men and the knowledge of sea-faring men, the word “Astor Street” is known from South-of-the-Slot to the beach-comber on a Pacific island. It was as if Kipling had said:

“ Twas Fulda Fisher’s boarding-house, where
sailor men reside;
And there were men from all the ports from
Mississipp to Clyde.”

What was the idea in McGhee’s mind? It was to show that he, McGhee, had been in a resort—“joint” as he called it; that he was sick; that he had been robbed. What was the reaction in the mind of the defendant? It is true that were the defendant to come to my office and tell me that same story, I would send him possibly to the Red Cross or to organized charity for help. But among those men who have sailed and fished, there is at least this that can be said of them—their charity and their sympathy differs from us who live in a different strata of life.

Let me go on with the defendant's own words:

“So, to tell you the truth, I had a bottle a little bigger than this one, in my possession.

Q. What bottle is that?

A. This is pills from Dr. Matson.

Q. How big was the bottle you had?

A. Just a little bigger than this bottle. And I had this for myself, you know, some time when I feel bad. I can't help it, you see, I am sick sometimes. Doctor tells me no smoke. I tell him I don't smoke—I smoke right now. Dr. Matson tell me don't smoke for three years, and Dr. Matson sent order for doctor, so he give me order for the same pills, and no smoke, no drink whiskey. A friend of mine tell me, ‘What are you looking for doctor? Whiskey is good for your sickness. Your lung is bad.’ He says, ‘It won't small hurt.’ I am no drinker, that I was ever drunk in my life, or drink so much; but I just have used little bit, and have in my pocket when I feel so bad, I go in somewhere in back room to have a little bit. Last me about three drinks, to take that way. Little bigger bottle than this—about three drinks.” (Transcript of Record, pages 28 and 29.)

I am willing to admit, if Your Honors' please, that the possession of this quantity of liquor might be *malum prohibitum*, but I deny that it was *malum in se*. I am not an advocate of the use of intoxicating liquor, but I challenge Your Honors in your own life

experiences to tell me there has never come the time or day that you have not seen honest men, possibly misinformed, who did not have the idea this ignorant fisherman had, that a small drink of whiskey was good for him.

The Government overlooks the fact that this man is a consumptive. Possibly never in your lifetimes have you seen those terrible paroxysms of coughing where the blood drips from the lips. Possibly in your lifetimes you have never seen those terrible heart attacks where a collapsed lung or broken down tissue ashens the face and the beads of perspiration drop from the forehead. There is no medical man who will deny the truth of this statement—that in such a situation whatever heart stimulant a man may have may ease off the “inevitable” hour. If Pasco Bakotich who had in his possession and for his own use, who had refused three times to sell intoxicating liquor to this man for money, came this snare, if you please, this entrapment, and if the words “entrap” and “ensnare” are synonymous, likewise with the word “entangle,” then may I not say with Matthew:

“Then went the Pharisees and took counsel how they might entangle him in his talk.”

But to proceed:

“Q. What did you do?”

A. Then I took out from my pocket, I seen him so sick, I thought to save his life. I know what sickness is.” (Transcript of Record, page 29.)

No man can deny that

“He jests at wounds who never felt a scar.”

When Pasco Bakotich said, “I know what sickness is,” a voice rings down throughout the years back to the time of the One who came down from Samaria and fell among thieves.

I sometimes think, if it please Your Honors, and if I may digress for but a few lines, that with all the laws of *malum prohibitum* that if the Master Himself came back to Clatsop County and if the people here were again starving, and He cast His net into the great Columbia that lays before our door, in order that He might once more repeat the miracle of the fishes and the loaves, that in that event, after He had fed the multitude and He would sit down again with the disciples to hold again a Last Supper, He would find waiting outside an Astoria police officer with four warrants; the first one reading “Fishing without a license”; a second warrant reading “Fishing by an alien”; a third warrant reading “Catching small fish”; and a fourth if he turned the water into wine, of a violation of the prohibition law. And, if I might be allowed a slight suggestion, were a place on the Prohibition Staff vacant I know of no better prohibition agent, if history be an honest woman, of her word, than Iscariot.

Let me proceed with the argument.

“I said, ‘Go ahead, McGhee.’ Then he come out, went in his pocket. He says, ‘Paul, I want you this, because, I know, of course, your money.’ I say, ‘No. That don’t cost me money

at all. I didn't buy that. There is friend of mine gave it to me. I gave you that for sickness, not for selling it to you. So if want help go ahead. Take your money back, I don't want your money.' And I didn't take his money. So then he see that something is wrong, that I don't take it away from him. Then he don't want the drink. So he took it he went back from the door, just as he was himself about three or four feet, he took his gun out, he says, 'Stay where you are.' I put my hand like this—I say, 'I won't move.' I stood right up. (Transcript of Record, page 29.)

There is little comment necessary on that statement. It has never been denied at all—never been denied. It is what took place in Pasco Bakotich's life in his place of business, and no man has the effrontery nor had the effrontery to deny it.

“Chief of Police, about three minutes after, come in. He says, 'What have you got in your hand?' He says, 'There is whiskey; *Paul gave it to me.*' 'Is Paul under arrest?' 'Yes, sir.' He asked me, 'Paul, give me empty bottle.' So I went down, I give him bottle—he poured that from the glass in the bottle. He just took me in his own machine up to the station.”
(Transcript of Record, pages 29 and 30.)

If ever a police court case was dignified, at least this one was glorified.

What impression this argument may make upon your Honors I do not know. Had my client the

money or had I the opportunity I would love nothing better than to make the argument before this Court myself. I can only present it to Your Honors' attention as the cold, naked type shows the testimony.

If I were right in my requested instructions, if I am right in my exceptions to the Court's instructions, Your Honors will see the point as quickly as do I.

It is regrettable in this case that the defendant was not tried in his own town by those jurors who knew him. Since it is not in the record I do not care to discuss that portion of the case. Pasco Bakotich has lived twenty-six years in Astoria. He has never been convicted of a crime. He is sentenced to nine months' imprisonment. (Transcript of Record, pages 13 and 14.)

For your kindness in reading this brief I am grateful. If it is impossible for me to appear in person, I am indeed the loser, and I confidently await Your Honorable verdict in this case, which is appealed to you for your justice.

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